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 and Medtronic, Inc.



UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PABBAN DEVELOPMENT, INC.,

Plaintiff,

vs.

KYPHON SÀRL, MEDTRONIC, INC.,
 AND DOES 1-100,

Defendants.

KYPHON SÀRL and MEDTRONIC,
 INC.,

Counterclaimants,

vs.

PABBAN DEVELOPMENT, INC,

Counterdefendant.

KYPHON SÀRL and MEDTRONIC,
 INC.,

Third-Party Plaintiff,

vs.

BIOMEDICAL DEVICES
 INTERNATIONAL, INC. and HARRY N.
 HERBERT,

Third-Party Defendants

No.: SACV 10-533 CJC (RNBx)

**DEFENDANTS KYPHON SÀRL
 AND MEDTRONIC, INC.'S
 ANSWER TO FIRST AMENDED
 COMPLAINT, COUNTERCLAIM
 AND THIRD-PARTY COMPLAINT**

DEMAND FOR JURY TRIAL

Honorable Cormac J. Carney

BY FAX

1 Defendants Kyphon Sàrl (“Kyphon Sàrl”) and Medtronic, Inc.
 2 (“Medtronic”) (collectively “Defendants”) respond to the First Amended Complaint of
 3 Plaintiff Pabban Development, Inc. (“Pabban”) as follows:

4
 5 1. Defendants admit the allegations contained in paragraph 1 of the First
 6 amended Complaint.

7 8 **JURISDICTION AND VENUE**

9 2. Defendants admit the allegations contained in paragraph 2 of the First
 10 Amended Complaint.

11
 12 3. Defendants admit that court has subject matter jurisdiction over this
 13 matter pursuant to 28 U.S.C. § 1332. Defendants also admit that the representations
 14 they made concerning their corporate status and principal places of business were
 15 accurate when removal was effectuated and that the action seeks damages in excess of
 16 \$75,000, exclusive of interests and costs and declaratory relief. The Defendants deny
 17 the remaining allegations contained in paragraph 3 of the First Amended Complaint,
 18 and each of them.

19
 20 4. Kyphon Sàrl admits that it and Pabban entered into an Asset Purchase
 21 Agreement (“APA”) that is dated as of August 7, 2008 and that Pabban is
 22 headquartered in Orange County, California. Defendants deny the remaining
 23 allegations contained in paragraph 4 of the First Amended Complaint, and each of
 24 them.

25 26 **FACTUAL BACKGROUND**

27 5. Defendants admit that Pabban is located in Irvine, California, that
 28 Syntech International and Bio-Medical Devices, Inc. are affiliated companies of

1 Pabban that operate out of a single facility, that Nick Herbert ("Herbert") is the CEO
2 of Pabban and that Herbert manages Pabban, Syntech International and Bio-Medical
3 Devices, Inc.

4
5 6. Defendants are without knowledge or information sufficient to form a
6 belief as to when Pabban began the process of developing a system that would assist
7 physicians in performing spinal surgeries. Defendants admit that one way physicians
8 treat Vertebral Compression Fractures ("VCF") is by injecting bone cement into the
9 site of the fracture. Defendants also admit that Vertebroplasty and Kyphoplasty are
10 two procedures used to treat VCF. Defendants also admit that physicians face many
11 challenges during VCF procedures. To the extent that the allegations contained in
12 paragraph 6 of the First Amended Complaint are inconsistent herewith, Defendants
13 deny those allegations, and each of them.

14
15 7. Defendants lack knowledge or information sufficient to form a belief as
16 to the reasons Pabban created the Natrix System, whether it was a significant leap
17 from existing devices in the market or whether experts in the field saw the Natrix
18 product as a significant break through for its ability to deliver any bone fillers, for a
19 wider period of time and with more precision and control. Defendants admit that the
20 ability of physicians to deliver bone cement while keeping a further distance from the
21 radiation field was a critical component of the Natrix System Pabban designed and
22 marketed. To the extent any of the allegations of paragraph 7 of the First Amended
23 Complaint are inconsistent herewith, Defendants deny those allegations, and each of
24 them.

25
26 8. Defendants admit that Pabban provided the Natrix System to physicians
27 to perform live VCF procedures to test and evaluate that product and that those
28 physicians used the Natrix product during those procedures. Defendants also admit

1 that these physicians provided favorable feedback to Pabban about their experiences
2 using the Natrix product during these live VCF procedures. Defendants also admit
3 that Pabban represented that it finalized the development and commercialization of
4 the Natrix product before August 2008. Defendants lack knowledge or information
5 sufficient to form a belief as to the truth of the remaining allegations contained in
6 paragraph 8 of the First Amended Complaint.

7
8 9. Defendants admit that in or about October 2006, Kyphon, Inc., the parent
9 of Kyphon-Sàrl, agreed to purchase certain assets of Disc-O-Tech Technologies, Ltd.
10 Defendants also admit that Kyphon, Inc. and the United States Federal Trade
11 Commission ("FTC") entered into a consent decree pursuant to which it was agreed
12 that the Disc-O-Tech Confidence product lines would be divested to an FTC approved
13 buyer. Defendants also admit that the Disc-O-Tech Confidence product lines
14 referenced in the consent decree were sold to De Puy Spine, Inc., a subsidiary of
15 Johnson & Johnson Company. Defendants also admit that Medtronic agreed to
16 acquire all of the outstanding shares of Kyphon, Inc. in July 2007. Defendants deny
17 the remaining allegations contained in paragraph 9 of the First Amended Complaint,
18 and each of them.

19
20 10. Defendants admit that Kyphon Sàrl and Pabban negotiated, drafted and
21 entered into the APA. Defendants further admit that Kyphon Sàrl conducted limited
22 due diligence of the Pabban assets and that during the due diligence process
23 representatives of Pabban misrepresented facts in order to induce Defendants to enter
24 the APA. Defendants further admit that at least one Medtronic employee observed
25 live VCF procedures in which physicians used the Natrix product. Defendants further
26 admit that Pabban represented that the Natrix product was ready to be used with
27 patients prior to closing of the transaction the APA memorializes. Defendants deny
28

1 the remaining allegations contained in paragraph 10 of the First Amended Complaint,
2 and each of them.

3
4 11. Defendants admit that they signed the APA on or about August 7, 2008
5 and that as a document in writing the APA is the best evidence of the parties'
6 respective duties and obligations. Defendants also admit that a portion of the APA is
7 attached as Exhibit A to the First Amended Complaint. Defendants deny the
8 remaining allegations contained in paragraph 11 of the First Amended Complaint, and
9 each of them.

10
11 12. Defendants admit that the APA required Pabban to, among other things,
12 transfer all of the assets related to the Natrix System to Kyphon Sàrl. Defendants also
13 admit that Medtronic and Syntech entered into a supply agreement. Defendants deny
14 the remaining allegations contained in paragraph 12 of the First Amended Complaint,
15 and each of them.

16
17 13. Defendants admit that the APA requires, among other things, payments
18 be made to Pabban if and only if Pabban satisfied all of its obligations under that
19 contract, did not breach the representations and warranties Pabban made therein, and
20 if and only if Pabban and its management did not commit fraud in connection with
21 that agreement. Defendants deny the remaining allegations contained in paragraph 13
22 of the First Amended Complaint, and each of them.

23
24 14. Defendants admit that the APA requires, among other things, payments
25 to be made to Pabban if and only if Pabban satisfied all of its obligations under that
26 contract, did not breach the representations and warranties it made therein, and if and
27 only if Pabban and its management did not commit fraud in connection with that
28

1 agreement. Defendants deny the remaining allegations contained in paragraph 14 of
2 the First Amended Complaint, and each of them.

3
4 15. Defendants admit the allegations contained in paragraph 15 of the First
5 Amended Complaint.

6
7 16. Defendants admit that Medtronic terminated the Global Supply
8 Agreement with Syntech because the Natrix System had substantial defects as more
9 fully set forth in the counterclaim submitted herewith, including a saline bag that
10 leaked and the fact that the Natrix product could not be sterilized. Moreover, Pabban
11 and Herbert knew of these defects prior to the closing of the APA yet hid them from
12 Defendants. Defendants deny the remaining allegations contained in paragraph 16 of
13 the First Amended Complaint, and each of them.

14
15 17. Defendants admit that Kyphon Sàrl has not made any additional
16 payments to Pabban under the APA and that it delivered to Pabban an officer's
17 certificate that complies with the APA. Defendants deny the remaining allegations
18 contained in paragraph 17 of the First Amended Complaint, and each of them.

19
20 18. Defendants admit that Kyphon Sàrl has not made any additional
21 payments to Pabban under the APA and that written communications were delivered
22 to Pabban that comply with the APA. Defendants deny the remaining allegations
23 contained in paragraph 18 of the First Amended Complaint, and each of them.

24
25 19. Defendants admit that on or about September 21, 2009 Medtronic
26 announced that Kyphon Sàrl would be offering the Kyphon Cement Delivery System
27 for sale. Defendants also admit that it has made no additional payments to Pabban
28

1 under the APA. Defendants deny the remaining allegations contained in paragraph 19
2 of the First Amended Complaint, and each of them.

3
4 20. Defendants admit that they have not made any additional payments to
5 Pabban under the APA and that no additional payments are required. Defendants
6 deny the remaining allegations contained in paragraph 20 of the First Amended
7 Complaint, and each of them.

8
9 21. Defendants deny the allegations contained in paragraph 21 of the First
10 Amended Complaint, and each of them.

11
12 22. Defendants admit that as a document in writing the APA is the best
13 evidence of its terms and conditions. To the text that the allegations contained in
14 paragraph 22 of the First Amended Complaint are inconsistent with the APA,
15 Defendants deny those allegations and each of them.

16
17 23. Defendants deny the allegations contained in paragraph 23 of the First
18 Amended Complaint, and each of them.

19
20 **FIRST CAUSE OF ACTION**
21 **(BREACH OF WRITTEN CONTRACT AGAINST**
22 **DEFENDANT KYPHON SÀRL)**

23 24. Defendants adopt and incorporate by reference as if fully stated herein
24 their responses to paragraphs 1-23 of the First Amended Complaint.

25
26 25. Defendants admit that Kyphon Sàrl and Pabban entered into an Asset
27 Purchase Agreement on or about August 7, 2008. Defendants deny the remaining
28

1 allegations contained in paragraph 25 of the First Amended Complaint, and each of
2 them.

3
4 26. Defendants deny the allegations contained in paragraph 26 of the First
5 Amended Complaint, and each of them.

6
7 27. Defendants admit the allegations contained in paragraph 27 of the First
8 Amended Complaint, and each of them.

9
10 28. Defendants deny the allegations contained in paragraph 28 of the First
11 Amended Complaint, and each of them.

12
13 29. Defendants admit that Kyphon Sàrl paid Pabban \$18,750,000 pursuant to
14 the terms and conditions of the APA. To the extent that any of the allegations
15 contained in paragraph 29 of the First Amended Complaint are inconsistent herewith,
16 Defendants deny those allegations, and each of them.

17
18 30. Defendants deny the allegations contained in paragraph 30 of the First
19 Amended Complaint, and each of them.

20
21 31. Defendants deny the allegations contained in paragraph 31 of the First
22 Amended Complaint, and each of them.

23
24 32. Defendants deny the allegations contained in paragraph 32 of the First
25 Amended Complaint, and each of them.

SECOND CAUSE OF ACTION
(BREACH OF GUARANTY AGAINST DEFENDANT
MEDTRONIC INC.)

33. Defendants adopt and incorporate by reference as if fully set forth herein their responses to paragraphs 1-32 of the First Amended Complaint.

34. Defendants admit that Kyphon Sàrl and Pabban entered into an APA on or about August 7, 2008, and that Medtronic executed the APA as a guarantor of Kyphon Sàrl's obligations, if any. Defendants deny the remaining allegations of paragraph 34 of the First Amended Complaint, and each of them.

35. Defendants admit that Kyphon Sàrl and Pabban entered into an Asset Purchase Agreement on or about August 7, 2008. Defendants deny the remaining allegations contained in paragraph 35 of the First Amended Complaint, and each of them.

36. Defendants deny the allegations contained in paragraph 36 of the First Amended Complaint, and each of them.

37. Defendants admit the allegations contained in paragraph 37 of the First Amended Complaint, and each of them.

38. Defendants deny the allegations contained in paragraph 38 of the First Amended Complaint, and each of them.

39. Defendants admit the allegations contained in paragraph 39 of the First Amended Complaint, and each of them.

1 40. Defendants deny the allegations contained in paragraph 40 of the First
2 Amended Complaint, and each of them.

3
4 41. Defendants admit that as a document in writing the APA is the best
5 evidence of its terms and conditions. To the extent the allegations contained in
6 paragraph 41 of the First Amended Complaint are inconsistent with the express
7 provision in the APA, Defendants deny those allegations, and each of them.

8
9 42. Defendants deny the allegations contained in paragraph 42 of the First
10 Amended Complaint, and each of them.

11
12 43. Defendants deny the allegations contained in paragraph 43 of the First
13 Amended Complaint, and each of them.

14
15 44. Defendants deny the allegations contained in paragraph 44 of the First
16 Amended Complaint, and each of them.

17
18 **THIRD CAUSE OF ACTION**

19 **(BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR**
20 **DEALING AGAINST DEFENDANTS KYPHON SÀRL, AND MEDTRONIC)**

21 45. Defendants adopt and incorporate by reference as if fully set forth herein
22 their responses to paragraphs 1-45 of the First Amended Complaint.

23
24 46. Defendants admit that Kyphon Sàrl and Pabban entered into an APA on
25 or about August 7, 2008, and that Medtronic executed the APA as a guarantor of
26 Kyphon Sàrl's obligations, if any. Defendants deny the remaining allegations of
27 paragraph 46 of the First Amended Complaint, and each of them.

1 47. Paragraph 47 of the First Amended Complaint contains assertions of law
2 (not facts) and thus, no response from Defendants is required. To the extent that
3 paragraph 47 of the First Amended Complaint contains factual allegations,
4 Defendants deny these allegations, and each of them.

5
6 48. Defendants deny the allegations contained in paragraph 48 of the First
7 Amended Complaint, and each of them.

8
9 49. Defendants deny the allegations contained in paragraph 49 of the First
10 Amended Complaint, and each of them.

11
12 **FOURTH CAUSE OF ACTION**
13 **(COMMON COUNT FOR REASONABLE VALUE OF GOODS SOLD**
14 **AND DELIVERED AGAINST DEFENDANTS**
15 **KYPHON SÀRL AND MEDTRONIC, INC.)**

16 50. Defendants adopt and incorporate by reference as if fully set forth herein
17 their responses to paragraphs 1-49 of the First Amended Complaint.

18
19 51. Defendants admit that on or about August 7, 2008 Pabban sold to
20 Kyphon Sàrl goods that included the Natrix System. Defendants deny the remaining
21 allegations contained in paragraph 51, and each of them.

22
23 52. Defendants deny the allegations contained in paragraph 52 of the First
24 Amended Complaint, and each of them.

25
26 53. Defendants deny the allegations contained in paragraph 53 of the First
27 Amended Complaint, and each of them.

1 54. Defendants deny the allegations contained in paragraph 54 of the First
2 Amended Complaint, and each of them.

3
4 **FIFTH CAUSE OF ACTION**

5 **(DECLARATORY RELIEF AGAINST KYPHON SARL)**

6 55. Defendants adopt and incorporate by reference as if fully set forth herein
7 their responses to paragraphs 1-54 of the First Amended Complaint.

8
9 56. Defendants deny the allegations contained in paragraph 56 of the First
10 Amended Complaint, and each of them.

11
12 57. Defendants admit the allegations contained in paragraph 57 of the First
13 Amended Complaint, and each of them.

14
15 58. Defendants deny the allegations contained in paragraph 58 of the First
16 Amended Complaint, and each of them.

17
18 59. Defendants deny the allegations contained in paragraph 59 of the First
19 Amended Complaint, and each of them.

20
21 60. Defendants admit that Pabban breached the APA and that Pabban is
22 liable to Kyphon Sarl for amounts in excess of \$15 million. Defendants further admit
23 that Kyphon Sarl sent a letter to Pabban dated April 7, 2009.

24
25 61. Defendants deny the allegations contained in paragraph 61 of the First
26 Amended Complaint, and each of them.

1 62. Defendants admit that an actual controversy has arisen between Pabban,
2 Kyphon Sàrl and others and that Kyphon Sàrl has complied with all of its obligations
3 under the APA. Defendants deny the remaining allegations contained in paragraph 62
4 of the First Amended Complaint, and each of them.

5
6 63. Defendants deny the allegations contained in paragraph 63 of the First
7 Amended Complaint, and each of them.

8
9 64. Defendants deny the allegations contained in paragraph 64 of the First
10 Amended Complaint, and each of them.

11
12 **PRAYER FOR RELIEF**

13 WHEREFORE, Defendants Kyphon Sàrl and Medtronic, Inc. incorporate
14 herein their responses to paragraphs 1-64 of the First Amended Complaint and deny
15 that Plaintiff is entitled to any of the relief it has requested in the First Amended
16 Complaint.

17
18 **AFFIRMATIVE DEFENSES**

19 **FIRST AFFIRMATIVE DEFENSE**

20 **(Set Off)**

21 Pabban's claims fail in whole or in part pursuant to Defendants' right to set-off.

22
23 **SECOND AFFIRMATIVE DEFENSE**

24 **(Unclean Hands)**

25 Pabban's claims fail in whole or in part pursuant to the doctrine of unclean
26 hands.